

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARC V. WARREN
Claimant

VS.

WONSER FARMS
Respondent

AND

WORKERS COMPENSATION FUND

Docket No. 205,854

MARC V. WARREN
Claimant

VS.

Spike's, INC.
Respondent

AND

WORKERS COMPENSATION FUND

Docket No. 205,855

ORDER

The respondent, Spike's, Inc., requests review of the preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes dated January 17, 1996.

ISSUES

The Administrative Law Judge granted claimant's request to consolidate these two proceedings and ordered Spike's, Inc. to provide claimant medical and temporary total disability benefits pending further order. The respondent, Spike's, Inc., contends the Administrative Law Judge erred by finding that Spike's, Inc. was claimant's statutory employer. It also contends that respondent Wonser Farms, Inc. should have been ordered to either pay this claim or indemnify Spike's, Inc. and that the Judge should have ordered the Workers Compensation Fund to provide claimant all the benefits awarded. The respondent, Wonser Farms, Inc., and the Workers Compensation Fund contend the Appeals Board does not have jurisdiction to review the issues raised by Spike's, Inc. Those are the issues the parties have requested the Appeals Board to review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, for purposes of preliminary hearing the Appeals Board finds as follows:

(1) The Appeals Board has the jurisdiction and authority to review a disputed preliminary hearing issue involving the question whether a worker is either an actual employee or statutory employee of a respondent. Under K.S.A. 44-534a, the following preliminary hearing issues are considered jurisdictional and subject to review by the Appeals Board: (1) Whether the employee suffered an accidental injury; (2) Whether the injury arose out of and in the course of the employee's employment; (3) Whether notice is given or claim timely made; or (4) Whether certain defenses apply.

Under K.S.A. 1995 Supp. 44-551, the Appeals Board has the jurisdiction to review preliminary hearing orders when it is alleged an administrative law judge has exceeded their jurisdiction. The Appeals Board finds the Administrative Law Judge did not exceed her jurisdiction in this proceeding by ordering respondent Spike's, Inc., rather than respondent Wonser Farms, Inc. or the Workers Compensation Fund to provide claimant workers compensation benefits pending further order.

Based upon the above statutes limiting review of preliminary hearing proceedings, coupled with the finding that the Administrative Law Judge did not exceed her jurisdiction in ordering Spike's Inc. to provide claimant benefits pending further order, the Appeals Board finds that it does not have the jurisdiction to review preliminary hearing findings pertaining to the question whether the Judge should have ordered the subcontractor or principal, as those terms are used in K.S.A. 1995 Supp. 44-503, to pay benefits to a claimant. Likewise, the Appeals Board does not have the jurisdiction to review a preliminary hearing finding pertaining to the question of whether the Workers Compensation Fund should provide the claimant benefits pending final award pursuant to the provisions of K.S.A. 44-532a when the employer is financially unable to pay compensation.

Regarding the contention that the Judge erred by failing to order respondent Wonser Farms, Inc. to indemnify Spike's, Inc., that request was not before the Administrative Law Judge and, therefore, that issue is not properly before the Appeals Board. See K.S.A. 44-555c that limits Appeals Board review to the questions of law and fact that were presented to the Administrative Law Judge.

Based upon the above, the sole issue in this review is whether claimant at the time of his accident on September 6, 1995 was an employee of respondent Spike's, Inc. as defined by K.S.A. 1995 Supp. 44-508(b) or statutory employee as contemplated by K.S.A. 1995 Supp. 44-503.

(2) The Appeals Board finds at the time of his accident claimant was employed by Wonser Farms, Inc., a subcontractor of Spike's, Inc., and that an employer/employee relationship existed between claimant and Wonser Farms, Inc. as contemplated by K.S.A. 1995 Supp. 44-508(b). Also, the Appeals Board finds that transporting commodities was a principal part of Spike's, Inc.'s trade or business and that it contracted with Wonser Farms, Inc. to perform that task. Therefore, under K.S.A. 1995 Supp. 44-503, the Administrative Law Judge had the discretion to order Spike's, Inc. to provide claimant workers compensation benefits. These conclusions are based upon the evidence that Wonser Farms, Inc. hired claimant in September 1994 to drive one of its trucks and that Wonser Farms, Inc. entered into a lease agreement with Spike's, Inc. to haul grain and rock. Spike's, Inc. is a commodities broker who owns no trucks and has no drivers on its payroll but utilizes 20 to 25 owner/operators to haul its commodities. Although he received his pay from Wonser Farms, Inc., and that company retained the power to terminate claimant or prevent him from hauling loads for Spike's, Inc., claimant received all his directions to pick up and deliver loads from Spike's, Inc.'s dispatchers.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Nelsonna Potts Barnes dated January 17, 1996 should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER _____

BOARD MEMBER _____

BOARD MEMBER _____

c: Richard J. Sanborn, Wichita, KS
James B. Zongker, Wichita, KS
David J. Rebein, Dodge City, KS
Steven L. Foulston, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director